No. 91-2019

In the

Supreme Court of the United States

October Term, 1992

STATE OF MINNESOTA,

Petitioner,

vs.

TIMOTHY DICKERSON,

Respondent.

ON WRIT OF CERTIORARI TO THE
MINNESOTA SUPREME COURT

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Does the Fourth Amendment to the United States Constitution permit a "plain feel" exception to its warrant requirement clause for seizures of objects where a police officer develops, through the *sense of touch* during a lawful pat search, probable cause to believe that the suspect possesses contraband or other evidence of a crime?

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PETITIONER'S BRIEF ON THE MERITS

OPINIONS BELOW

The opinion of the Minnesota Supreme Court, reproduced at Appendix A of the Petition for a Writ of Certiorari,[1] is reported at 481 N.W.2d 840 (Minn. 1992). The opinion of the Minnesota Court of Appeals, reproduced in Appendix B of the Petition, is reported at 469 N.W.2d 462 (Minn. Ct. App. 1992). The order of the Fourth Judicial District Court,[2] reproduced at Appendix C of the Petition, is unreported.

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1. Hereinafter referred to as Petition.

2. Hereinafter referred to as Trial Court Order.

STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the Minnesota Supreme Court was entered on March 20, 1992. The Petition for a Writ of Certiorari was filed on June 17, 1992, within ninety days of the Minnesota Supreme Court's decision. This Court granted the Writ for Certiorari on October 5, 1992.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a) (1992).

CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT OF THE CASE

On November 9, 1989, Officer Vernon Rose of the Minneapolis Police Department was on a routine patrol in the area of 10th and Morgan Avenue North in Minneapolis, Minnesota (T. 7-8).[3] Officer Rose was a 14-year veteran of the department, having served 11 and 1/2 of those years in that area of Minneapolis. In the prior two years, Officer Rose had participated in the execution of approximately 75 drug search warrants and made between 50 and 75 drug arrests (T. 4-6, 21-22). He had both responded to complaints about drug dealings and participated in the execution of search warrants at the apartment building located at 1030 Morgan Avenue North. The searches had resulted in seizures of drugs, guns and knives (T. 6-7, 14, 16, 21).

At approximately 8:15 p.m., Officer Rose saw Respondent, Timothy Dickerson, exit the front door of 1030 Morgan Avenue North and walk towards the street (T. 8). When Respondent saw the squad car, he turned abruptly and walked towards the alley (T. 8, 12-14). Officer Rose and his partner drove into the alley and stopped Respondent (T. 9).

The trial court, the Minnesota Court of Appeals and the Minnesota Supreme Court all found that Officer Rose had sufficient grounds under *Terry v. Ohio*, 392 U.S. 1 (1968), to stop Respondent and, incident to that stop, to conduct a protective pat search of Respondent's person. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992)

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3. "T" refers to the transcript of the evidentiary hearing, the court trial and the sentencing hearing. The facts set forth in this brief mirror specific findings the trial court made. The trial court's findings are reprinted at Appendix C-1-2 in the Petition.

(Petition Appendix A-5); *State v. Dickerson,* 469 N.W.2d 462, 465 (Minn. Ct. App. 1991), *aff'd,* 481 N.W.2d 840 (Minn. 1992) (Petition Appendix B-6); Trial Court Order (Petition Appendix C-3-5).

While conducting a pat search of Respondent, Officer Rose felt a small, hard object wrapped in plastic in the pocket of Respondent's "very fine nylon" jacket (T. 9). Based upon his feel of the object, as well as his prior experience in feeling crack cocaine through clothing, Officer Rose concluded that the object was crack cocaine. Having probable cause to believe the object was contraband, Officer Rose seized the object from Respondent's pocket (T. 9-10). Later testing confirmed that the object was .20 grams of crack cocaine (T. 64).

On December 28, 1989, Respondent was charged with the offense of controlled substance crime in the fifth degree.[4] At a pretrial hearing, Respondent moved to suppress the seized crack cocaine arguing that the stop and pat search violated the Fourth and Fourteenth Amendments of the United States Constitution (T. 2-3). Both Officer Rose and Respondent testified concerning the events leading up to the seizure of the crack cocaine.

Officer Rose testified that when he searched Respondent "for weapons and contraband," he "felt a lump, a small lump, in the front pocket. [He] examined it with [his] fingers and it slid and it felt to be a lump of crack cocaine in cellophane" (T. 9). Officer Rose also testified that because he had "felt [crack cocaine] in clothing" approximately 50 to 75 times on prior occasions, he "was absolutely sure that's what [was in Respondent's pocket], or

4. *See* Minn. Stat. § 152.025, subd. 2(1), subd. 3(a) (1989) (reprinted at Appendix A-1 of this Brief) (hereinafter referred to as Brief Appendix).

[he] would have left it there" (T. 5-6, 9-10). Respondent did not present any evidence to dispute Officer Rose's testimony concerning the touching and seizing of the crack cocaine (T. 28-33).

On March 6, 1992, the trial court found that the investigative stop and pat search were proper. *See* Trial Court Order (Petition Appendix C-3). The court also ruled that Officer Rose acted properly in seizing the crack cocaine. *See id.* In upholding the seizure, the court stated:

> [T]here is no distinction as to which sensory perception the officer uses to conclude that the material is contraband. An experienced officer may rely upon his sense of smell in DWI stops or in recognizing the smell of burning marijuana in an automobile. The sound of a shotgun being racked would clearly support certain reactions by an officer. The sense of touch, grounded in experience and training, is as reliable as perceptions drawn from other senses. "Plain feel," therefore, is no different than plain view and will equally support the seizure here.

Trial Court Order (Petition Appendix C-5).

Respondent requested that the case be submitted to the trial court on the basis of the testimony presented at the pretrial hearing and on certain stipulated facts (T. 61). On May 9, 1990, the court found Respondent guilty of controlled substance crime in the fifth degree (T. 65-66). The court deferred entry of the judgment of guilt[5] and

5. Under Minn. Stat. § 152.18, subd. 1 (1989) (Brief Appendix A-2-3), a trial court may, without entering a judgment of guilt, place a defendant found guilty under the controlled substance laws on

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placed Respondent on probation for a period of two years (T. 68-69).[6]

Respondent appealed. On April 30, 1991, the Minnesota Court of Appeals affirmed the propriety of Officer Rose's stop and pat search of Respondent. *See Dickerson*, 469 N.W. 2d at 465 (Petition Appendix B-6-7). But the court of appeals declined "to adopt the plain feel exception in Minnesota" and found that the seizure of the crack cocaine was improper. *Dickerson*, 469 N.W.2d at 467 (Petition Appendix B-10).

The State petitioned to the Minnesota Supreme Court arguing that the court of appeals' ruling on the seizure was incorrect.[7] On March 20, 1992, the Minnesota Supreme Court unanimously held that the stop and pat search were proper. *See Dickerson*, 481 N.W.2d at 843 (Petition Appendix A-5). But, in a four-to-three decision, the supreme court held that Officer Rose's seizure of the crack cocaine, violated the Fourth Amendment of the United States Constitution.[8] The majority concluded that the seizure of crack cocaine "in this case required a warrant, which police did not have." *Id.* (Petition Appendix A-5).

Three members of the Minnesota Supreme Court dissented, finding that the majority's conclusion represented "a departure from common sense and common experience." *Id.* at 846 (Coyne, J., dissenting) (Appendix A-13). The dissenters reasoned:

> This simple act of feeling the outline and shape of the lump was permissible under *Terry*, and it appears from Rose's testimony that, because of his extensive experience in discovering crack cocaine while patting down previous suspects, he was "absolutely sure" that the substance was crack cocaine "before" he reached into the pocket and removed it.
>
> * * *

Footnote 5 cont from previous page

probation for a period of time. If the defendant successfully completes probation, the proceedings against the defendant are dismissed. *See id.* A non-public record of the proceedings is maintained and is made available to courts to determine the merits of any future proceedings against the defendant. *See id.* A deferred adjudication under this statute will also be included in a defendant's criminal history score if he is convicted of a federal offense. *See* U.S.S.G. §§ 4A1.1(c) and 4A1.2(f) (Brief Appendix B-1-4).

6. On May 6, 1992, Respondent successfully completed probation and the criminal proceedings were dismissed pursuant to Minn. Stat. § 152.18 (1989).

7. Contrary to a statement in the Minnesota Supreme Court's decision, *State v. Dickerson*, 481 N.W.2d 840, 842 (Minn. 1992) (Petition Appendix A-2), Respondent did not file a cross appeal and, thus, did not challenge the court of appeals' rulings on the stop and pat frisk.

8. The Minnesota Supreme Court based its opinion on the Fourth Amendment to the United States Constitution. The court's decision repeatedly refers to the Fourth Amendment as the basis for its decision. *See State v. Dickerson*, 481 N.W.2d 840, 843-44 (Minn. 1982) (Petition Appendix A-4-7). The search and seizure provision of the Minnesota State Constitution is contained in Article I, § 10 (Brief Appendix A-1). The Minnesota Supreme Court neither stated nor implied that Article I, § 10, served as any basis for its decision. In contrast, the Minnesota Supreme Court has clearly articulated those instances in which the state constitution serves as the basis for its decision. *Cf. State v. Russell*, 477 N.W.2d 886, 888 (Minn. 1991) (in invalidating statutory distinctions between crack cocaine and powder cocaine on the ground that it was racially discriminatory, the supreme court clearly enunciated that it was basing its decision on the state constitution rather than the federal constitution's Equal Protection Clause).

> [T]he officer did not violate [Respondent's] fourth amendment rights in discovering and seizing the crack cocaine.
>
> * * *
>
> *[A] policeman should not be compelled to ignore what his senses--whether sight, sound, smell, taste, or touch--tell him in clear and unmistakable language.*

Id. at 849, 851 (Coyne, J., dissenting) (emphasis added) (Petition Appendix A-18-19, A-23-24).

On June 17, 1992, the State of Minnesota filed its Petition for a Writ of Certiorari to the Minnesota Supreme Court with this Court. On October 5, 1992, this Court granted the Petition for a Writ of Certiorari.

SUMMARY OF ARGUMENT

1. The primary issue is whether the Fourth Amendment permits police to rely upon the sense of touch when determining if, under the totality of the circumstances, they have probable cause to seize a non-weapon object during a *Terry* pat search.

a. This Court has held that probable cause is a flexible, common sense standard. *See Texas v. Brown*, 460 U.S. 730, 742 (1983). This Court's decisions reflect that, for Fourth Amendment purposes, there is no hierarchy among the senses with respect to reliability. Law enforcement officers are able to rely upon all of their senses when making probable cause determinations concerning the presence of contraband or other evidence of a crime. *See, e.g., Johnson v. United States*, 333 U.S. 10, 13-14 (1948). Officers are also permitted to rely upon their sense of touch to identify objects when their lives are subject to danger. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Both scientific research and common sense indicates that, under certain circumstances, the sense of touch may prove as or more reliable than the sense of sight in identifying objects. Numerous courts adopting the "plain feel" corollary to the "plain view" doctrine have found that the sense of touch can, within the totality of the circumstances, establish probable cause that an object is contraband or other evidence of a crime. *See, e.g., United States v. Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990).

This Court's decision in *Terry* is the forerunner of the "plain feel" exception. *Terry* permits police to rely upon their sense of touch to determine if an object is a weapon. This case extends *Terry* to the next logical step -- that the

Fourth Amendment permits police engaged in a lawful touching to rely upon their sense of touch to determine if an object is contraband or other evidence of a crime.

b. Police are entitled to make a warrantless seizure of an object when they have lawful access to the object and have developed probable cause to believe that the object is contraband or other evidence of a crime. *See Brown*, 460 U.S. at 739. Such seizures are permissible even when the probable cause is developed during the course of a *Terry* stop. *See Michigan v. Long*, 463 U.S. 1032, 1050 (1983).

Requirement of a warrant in this case is both unnecessary and impractical. Because of the time necessary to obtain a warrant, police would have to either detain Respondent for a lengthy period of time or allow Respondent to walk away with the crack cocaine. The first alternative would constitute a greater intrusion than the seizure of the crack cocaine. The second alternative would unduly hamper effective law enforcement.

c. Once police obtain probable cause to believe that an object possessed by a suspect is contraband or other evidence of a crime, a suspect no longer retains any privacy interest in the object. The suspect's only remaining interest is possessory. Therefore, seizure of the object does not violate any Fourth Amendment protected right of privacy. *See Horton v. California*, 496 U.S. 128, 133-34 (1990).

Probable cause seizures based upon the sense of touch are no more intrusive than probable cause seizures based upon the sense of sight. Since the initial intrusion was caused by the permissible touching of the crack cocaine and this touching created probable cause, Officer Rose's seizure of the object did not invade any of Respondent's constitutionally protected privacy rights.

Permitting police to make probable cause seizures of non-weapon objects during protective pat searches will not encourage police to conduct pretextual stops or to go beyond the limits of a proper *Terry* search. There is no incentive for police to engage in improper stops and pat searches since, if the underlying stop and search is improper, any resulting evidence will not be admissible at trial. Excluding evidence obtained as a result of probable cause developed during a valid *Terry* stop only results in the suppression of probative evidence and does nothing to deter improper *Terry* stops and searches.

d. Officer Rose's seizure of the crack cocaine was permissible not only under the "plain feel" exception, but also under the search incident to arrest exception to the warrant clause. The same probable cause which justified seizure of the crack cocaine would have also justified the warrantless arrest of Respondent for possession of a controlled substance. Once Respondent was under arrest, the crack cocaine could properly be seized in a search incident to that arrest. *See Chimel v. California*, 395 U.S. 752, 755-56 (1969).

The fact that a seizure takes place immediately before, rather than immediately after, the arrest is of no constitutional significance. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980). Whether the seizure was done as a search incident to arrest or as a probable cause seizure under the "plain feel" exception, Officer Rose developed probable cause by touching Respondent's pocket. Under the totality of the circumstances, this touch justified the warrantless seizure of the crack cocaine.

2. Warrantless seizures are permitted under the "plain feel" corollary to the plain view doctrine if two

criteria are met. First, the officer must have lawfully touched the item. Second, the officer's sense of touch, within the totality of the circumstances, must provide the officer with probable cause to believe that the object he felt was contraband or other evidence of a crime.

Both criteria have been satisfied in this case. First, as all three courts found below, Officer Rose made a valid *Terry* stop and lawfully touched Respondent's pocket during a protective pat search. Second, this feel of the pocket, under the totality of the circumstances, established probable cause that the lump in Respondent's pocket was cocaine. The other circumstances include Officer Rose's extensive prior experience with feeling crack cocaine through clothing, his knowledge that Respondent had just left a known crack house and his observation that Respondent took evasive actions when he saw the police car.

The trial court had an opportunity to view Officer Rose's demeanor and found his testimony concerning his identification of the lump as crack cocaine to be credible. Respondent did not offer any testimony to contradict Officer Rose's testimony nor did Respondent request that the trial court feel the crack cocaine. Independent review of the record supports the trial court's credibility finding.

ARGUMENT

I.

POLICE MAY SEIZE CONTRABAND WITHOUT A WARRANT WHEN THEY DEVELOP, THROUGH THE SENSE OF TOUCH DURING A LAWFUL *TERRY* PAT SEARCH, PROBABLE CAUSE TO BELIEVE THAT A SUSPECT POSSESSES CONTRABAND OR OTHER EVIDENCE OF A CRIME.

The Fourth Amendment to the United States Constitution permits police to rely upon all of their senses, including the sense of touch, when making probable cause determinations. Probable cause is based upon the totality of the circumstances and can be supported by one or more of a police officer's senses. To require police to ignore contraband discovered during the course of a legitimate *Terry* frisk *solely* because the probable cause is based, in part, upon the officer's sense of touch defies common sense and unnecessarily hampers effective law enforcement.

A. Probable Cause for a Search and Seizure Can Be Based on All of an Officer's Senses.

> [P]robable cause is a flexible, common-sense standard. It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief," . . . that certain items may be contraband or stolen property or useful as evidence of a crime; it does not demand any showing that such a belief be correct or more likely true than false. A "practical,

> nontechnical" probability that incriminating evidence is involved is all that is required.

Texas v. Brown, 460 U.S. 730, 742 (1983) (citations omitted). For an officer to have probable cause to believe contraband is present, the contraband "must only be 'obvious to the senses . . . .' To be obvious to the senses, contraband need only reveal itself in a characteristic way to one of the senses." *United States v. Norman*, 701 F.2d 295, 297 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983) (citation omitted) (quoting *United States v. Sifuentes*, 504 F.2d 845, 848 (4th Cir. 1974)).

This Court has repeatedly indicated that probable cause can be determined through senses other than sight.[9] In *Johnson v. United States*, 333 U.S. 10 (1948), this Court effectively recognized a "plain smell" corollary to the "plain view" exception. The defendant in *Johnson* argued that a narcotics officer's detection of the odor of burning opium from an adjacent room was an insufficient basis to justify the issuance of a search warrant. In rejecting this argument, this Court stated that detection of the presence of distinctive odors by one "qualified to know the odor" established probable cause for the search. *Id.* at 13; *see also United States v. Johns*, 469 U.S. 478, 482 (1985) (scent of marijuana from trucks established probable cause to believe trucks contained contraband).

Similarly in *Brown*, this Court affirmed the seizure of a balloon where the officer's experience and the balloon's outward appearance established probable cause to believe that the balloon contained narcotics even though the officer

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9. *See generally* Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 Dick. L. Rev. 521, 533-37 (1991).

"could not see through the opaque fabric of the balloon." *Brown*, 460 U.S. at 743. *See generally Arkansas v. Sanders*, 442 U.S. 753, 764-65 n.13 (1979), *overruled on other grounds by California v. Acevedo*, ___ U.S. ___, 111 S. Ct. 1982 (1991) (despite the fact that certain objects cannot be seen, these objects are subject to a probable cause seizure if "their contents can be inferred from their outward appearance").

This Court has also recognized that police may rely upon their sense of touch when detecting weapons on a potentially armed suspect. *See Terry v. Ohio*, 392 U.S. 1, 30 (1968).

Implicit in this Court's decisions is the principle that there is no preferential ranking of the senses in developing probable cause. The senses of touch, smell and hearing are not inherently less reliable than the sense of sight. When identifying certain objects, the sense of touch may be more accurate than the other senses.[10]

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10. Several studies have shown that haptic identification (perceptual system using the hands as well as other parts of the body) is remarkably fast and accurate in recognizing distinctive qualities such as texture, hardness, thermal conductivity and absolute size. *See* Roberta L. Klatzky, et al., *Haptic Integration of Object Properties: Texture, Hardness, and Planer Contour*, 15 Journal of Experimental Psychology: Human Perception and Performance 45, 56 (1989); Roberta L. Klatzky, et al., *Identifying Objects by Touch: An "Expert System,"* 37 Perception & Psychophysics 299, 300-01 (1985) (hereinafter referred to as Klatzky, *Identifying Objects*); Roberta L. Klatzky, et al., *There's More to Touch Than Meets the Eye: The Salience of Object Attributes for Haptics With and Without Vision*, 116 Journal of Experimental Psychology: General 356, 357 (1987). For example, an individual may more precisely and more quickly identify a fabric such as suede by touching it than by merely viewing it at length. With experience, it was found that people needed less time and sensory input to identify familiar objects and that "past experience with objects --

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Thus, under certain circumstances, an officer's other senses may prove to be more reliable than his sense of sight. For example, the sense of sight often cannot distinguish between a hand rolled tobacco cigarette and a hand rolled marijuana cigarette. Once the two cigarettes are lit, an experienced police officer could easily distinguish between the two cigarettes using his sense of smell.

The sense of hearing is also more helpful than the sense of sight if a gun is fired behind a closed door. An officer would not be able to see the gun fire, but undoubtedly he would be able to hear it as well as ascertain whether the weapon fired was a rifle, shotgun or handgun.

A more pertinent example is provided by powder cocaine. A trained police officer would not be able to distinguish between powder cocaine and baking powder through the sense of sight. But an experienced narcotics officer could distinguish between the two powders through the sense of touch.

Indeed, no court could issue a ranking of the senses for purposes of probable cause determinations. Police must serve under a variety of circumstances and in an infinite number of situations. Reliability of all senses will vary, but no sense is so inherently unreliable that police should be barred from using it when making a probable cause determination.

Scientific research[11] as well as common sense confirms the reliability of the sense of touch. Not

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visual as well as tactile -- might enable [identification] on the basis of minimal cues." Klatzky, *Identifying Objects*, at 301.

11. In a study, 100 objects no larger than a hand were placed before twenty individuals. On the average, the twenty participants were able to identify 94 of the 100 objects within five seconds using

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surprisingly, courts have rejected the contention "that the tactile sense is inherently less reliable than the sense of sight." *United States v. Pace*, 709 F. Supp. 948, 955 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990). In adopting the "plain feel" exception, the *Pace* court concluded that:

> When objects have a distinctive and consistent feel and shape that an officer has been trained to detect and has previous experience in detecting, then touching these objects provides the officer with the same recognition his sight would have produced.

Id. A total of five federal circuit courts of appeals,[12] two federal district courts[13] and appellate courts in ten states[14] have adopted the "plain feel" exception.

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their sense of touch. *See* Roberta L. Klatzky, et. al., *Identifying Objects by Touch: An "Expert System,"* 37 Perception & Psychophysics 299, 301 (1985).

12. *See United States v. Buchannon*, 878 F.2d 1065, 1067 (8th Cir. 1989); *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987); *United States v. Norman*, 701 F.2d 295, 297 (4th Cir.), *cert. denied*, 464 U.S. 820 (1983); *United States v. Ocampo*, 650 F.2d 421, 429 (2d Cir. 1981); *United States v. Portillo*, 633 F.2d 1313, 1320 (9th Cir. 1980), *cert. denied*, 450 U.S. 1043 (1981).

13. *See United States v. Ceballos*, 719 F. Supp. 119, 128 (E.D.N.Y. 1989); *United States v. Pace*, 709 F. Supp. 948, 954 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990). Research has disclosed one case where a federal district court ruled that police were not allowed to seize an item from a suspect's pocket even though the officer believed that the lump in the pocket contained cocaine. *See United States v. Rodriquez*, 750 F. Supp. 1272, 1275 (W.D.N.C. 1990). This case, however, is distinguishable from the

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This Court's decision allowing weapon seizures based upon the sense of touch in *Terry* "is perhaps the most logical forerunner of the plain touch corollary" for probable cause seizures. Larry E. Holtz, *The "Plain Touch" Corollary: A Natural and Foreseeable Consequence of the Plain View Doctrine*, 95 Dick. L. Rev. 521, 534 (1991) (hereinafter referred to as Holtz, *"Plain Touch"*). In *Terry*, while conducting a protective pat search, Officer McFadden felt an object he believed was a weapon while patting down the outside pocket of Terry's overcoat. *See Terry*, 392 U.S. at 7. His determination that what he felt was a weapon was based upon his training and experience as a police officer. *See id.* at 5. Consequently, Officer

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"plain feel" cases because the officer "saw" the lump in the suspect's pocket and did not "feel" it during a pat search. The court apparently concluded that observation of "a small, inconspicuous bulge" was not a sufficient basis to believe that the lump was cocaine. *Id.* at 1275 n.1.

14. *See Jackson v. State*, 804 S.W.2d 735, 740 (Ark. Ct. App. 1991); *People v. Chavers*, 658 P.2d 96, 102 (Cal. 1983); *People v. Hughes*, 767 P.2d 1201, 1205-06 (Colo. 1989); *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992); *State v. Lee*, 520 So. 2d 1229, 1233 (La. Ct. App. 1988); *State v. Vanacker*, 759 S.W.2d 391, 393-94 (Mo. Ct. App. 1988); *State v. Vasquez*, 815 P.2d 659, 664 (N.M. Ct. App.), *cert. denied*, 815 P.2d 1178 (N.M. 1991); *State v. Alamont*, 577 A.2d 665, 668-69 (R.I. 1990) (affirmed as seizure incident to arrest); *Ruffin v. Commonwealth*, 409 S.E.2d 177, 179-80 (Va. Ct. App. 1991); *State v. Richardson*, 456 N.W.2d 830, 836-39 (Wis. 1990).

Appellate courts in two states have considered the "plain feel" doctrine, but found it unnecessary under the facts in their cases to decide whether the doctrine should be adopted. *See State v. Ortiz*, 683 P.2d 822, 829 (Haw. 1984), *aff'g on other grounds*, 662 P.2d 517 (Haw. Ct. App. 1983); *State v. Zearley*, 444 N.W.2d 353,

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McFadden's "feel" or touching of the item, coupled with his years of experience as a police officer, provided him with reasonable grounds to conclude that the object was a weapon and subject to seizure. *Id.* at 30.

Under *Terry*, police may properly rely upon their sense of touch to conclude that an object may be a weapon. The logical extension of *Terry* -- permitting police to conclude that other objects felt during a proper pat search are contraband or other evidence of a crime -- is present in this case.

Like Officer McFadden in *Terry*, Officer Rose was conducting a lawful pat search when he felt an object in the outside pocket of Respondent's very fine nylon jacket (T. 9). Also, like Officer McFadden, Officer Rose testified that he was able to identify the seized object because of its

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358-59 (N.D. 1989), *aff'd appeal after remand*, 468 N.W.2d 391 (N.D. 1991). Appellate courts in two states are divided on whether the "plain feel" doctrine should be adopted. *Compare Anderson v. State*, 553 A.2d 1296, 1300 (Md. Ct. Spec. App. 1989) *with Alfred v. State*, 487 A.2d 1228, 1239-40 (Md. Ct. Spec. App. 1985); *compare In the Matter of Marrhonda G.*, 575 N.Y.S.2d 425, 429-31 (N.Y. Fam. Ct. 1991), *aff'd*, 585 N.Y.S.2d 345 (N.Y. App. Div. 1992) *with In the Matter of James L.*, 519 N.Y.S.2d 675, 676 (N.Y. App. Div. 1987).

In addition to Minnesota, appellate courts in five states have rejected the "plain view" doctrine. *See McDaniel v. State*, 555 So. 2d 1145, 1147 (Ala. Crim. App. 1989), *cert. denied*, ___ U.S. ___, 111 S. Ct. 43 (1990); *State v. Collins*, 679 P.2d 80, 81-82 (Ariz. Ct. App. 1983); *State v. Rhodes*, 788 P.2d 1380, 1381 (Okla. Crim. App. 1990); *Commonwealth v. Marconi*, 597 A.2d 616, 623 (Pa. Super. Ct. 1991), *appeal denied*, 611 A.2d 711 (Pa. 1992) (item not sufficiently distinguishable); *State v. Broadnax*, 654 P.2d 96, 102-03 (Wash. 1982).

distinctive shape and consistency (T. 9-10). The difference between this case and *Terry* is that the item seized in this case was a controlled substance rather than a weapon.[15]

The Fourth Amendment does not favor one sense over other senses for probable cause determinations. A police officer is not required to actually view an object before he can conclude he has probable cause to believe that an object is subject to seizure. Instead, probable cause can be based upon any of the officer's senses when the information learned from this sense, combined with the officer's experience and knowledge within the totality of the circumstances, leads him to reasonably believe that an object constitutes contraband or evidence of a crime.

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15. Seizure of a non-weapon object during a *Terry* search is also supported by Professor LaFave:

> Assuming the object discovered in the pat-down does not feel like a weapon, this only means that a further search may not be justified under a *Terry* analysis. *There remains the possibility that the feel of the object, together with other suspicious circumstances, will amount to probable cause that the object is contraband or some other item subject to seizure, in which case there may be a further search based upon that probable cause.*

Wayne LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 9.4(c) at 524 (2d ed. 1987) (footnote omitted) (emphasis added).

B. A Police Officer May Make a Warrantless Seizure of an Object if He Develops Probable Cause During a Stop to Believe that a Suspect Possesses Contraband or Other Evidence of a Crime.

1. A warrant is not required for a seizure when police obtain probable cause to seize an object during a lawful *Terry* stop.

A police officer is entitled to make a warrantless seizure of an object when, during a lawful stop of a person or car, the officer develops probable cause to believe that an object is contraband or other evidence of a crime. *See Brown*, 460 U.S. at 739; *see also Payton v. New York*, 445 U.S. 573, 587 (1980) ("objects such as weapons or contraband found in a public place may be seized by the police without a warrant"); *United States v. Place*, 462 U.S. 696, 701-02 (1983) (seizures are proper when an item is in plain view under certain circumstances and "the risk of the item's disappearance or use for its intended purpose before a warrant may be obtained outweighs the interest in possession").

The warrantless seizure of non-weapon items is proper even if the police officer's perception occurs during a *Terry* search for weapons. In holding that contraband may be seized during a *Terry* search of a car, this Court stated:

> If, while conducting a legitimate *Terry* search . . . the officer should, as here, discover contraband other than weapons, *he clearly cannot be required to ignore the contraband*, and

> the Fourth Amendment does not require its suppression in such circumstances.

Michigan v. Long, 463 U.S. 1032, 1050 (1983) (citations omitted) (emphasis added).

Not only is a warrant unnecessary under these circumstances, it is also impractical. If police were to detain Respondent while they obtained a warrant, the lengthy detainment would be a far greater intrusion than was the immediate seizure of the crack cocaine. On the other hand, if Respondent were allowed to walk away, either he or the cocaine would likely disappear before police could obtain a warrant.

When probable cause is established in a stop situation, the additional step of obtaining a warrant does nothing to further the Fourth Amendment's central purpose of ensuring that searches and seizures are reasonable. Exigent circumstances justifies a warrantless seizure in stop situations. As this Court has stated:

> [R]equiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property, or incriminating evidence generally would be a 'needless inconvenience' . . . that might involve danger to the police and public.

Brown, 460 U.S. at 739 (citations omitted).

This Court's decisions establish that once an officer has probable cause to seize an object during a *Terry* stop, he is not required to stop and go obtain a warrant. Nonetheless, the Minnesota Supreme Court erroneously concluded that Officer Rose needed a warrant before he could seize the crack cocaine from Respondent's pocket.

The court imposed a warrant requirement because the probable cause was based, in part, upon Officer Rose's touch of the pocket. *See State v. Dickerson*, 481 N.W.2d 840, 843 (Minn. 1992) (Petition Appendix A-5). But, for purposes of the Fourth Amendment, probable cause based upon the sense of touch is equally as credible as probable cause based upon other senses.[16] Consequently, the propriety of a seizure during a stop depends upon whether there is probable cause, not how the probable cause is developed.

In determining whether a warrant is required, courts must strike a realistic balance between a suspect's possessory interest and the need for effective law enforcement. *See Brown* 460 U.S. at 739. The Minnesota Supreme Court's decision did not provide a realistic balance. Its imposition of a warrant requirement for this seizure "represents a departure from common sense and common experience." *Dickerson*, 481 N.W.2d at 846 (Coyne, J., dissenting) (Petition Appendix A-13).

2. A probable cause seizure based upon the sense of touch is no more intrusive than a probable cause seizure based upon the sense of sight.

This Court has repeatedly stated that once police obtain probable cause to believe that an object is contraband or other evidence of a crime, the suspect no longer has a privacy interest to protect. *See Horton v. California*, 496 U.S. 128, 133-34 (1990); *Illinois v. Andreas*, 463 U.S. 765, 771 (1983); *Brown*, 460 U.S. at 741-42.

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16. *See* Appendix I.A. of this Brief.

From his perceptions obtained before and during a legitimate *Terry* stop and pat search, Officer Rose developed probable cause to believe Respondent possessed crack cocaine. Officer Rose's intrusion into Respondent's privacy went no further than *Terry* and its progeny allow. Once this probable cause was developed, Respondent's interest in the crack cocaine became possessory only. *See United States v. Williams*, 822 F.2d 1174, 1182 (D.C. Cir. 1987) ("no reasonable expectation of privacy attaches to containers whose contents are readily discernible through the use of some sense other than sight"). In light of the dangers that crack cocaine poses to the public, Officer Rose was fully justified in interfering with Respondent's bare possessory interest. *See Brown*, 460 U.S. at 739.

Although the Minnesota Supreme Court unanimously agreed that the stop and pat search of Respondent was permissible under *Terry*, the majority of the court refused to permit the warrantless seizure of the crack cocaine on the ground that probable cause developed through the sense of touch "is far more intrusive into the personal privacy." *Dickerson*, 481 N.W.2d at 845 (Petition Appendix A-8). But, because the touching of Respondent's pocket was permissible and this touching resulted in probable cause for the seizure, Respondent no longer retained a privacy interest in the crack cocaine. Consequently, seizure of the crack cocaine was no more intrusive in this situation than it would have been had Officer Rose visibly seen the crack cocaine in Respondent's pocket before he seized it.

Implicit in the Minnesota Supreme Court's decision is the concern that allowing seizure of items where the probable cause is based, in part, upon the sense of touch, will encourage police to conduct pretext stops and to exceed the permissible scope of a *Terry* weapons search. Yet, the appropriate manner for addressing this concern is through

strict enforcement of the *Terry* limits. *Cf. Horton*, 496 U.S. at 139-40 (enforcing limitations on search activities would be more effective in preventing improper searches than retaining an inadvertence requirement). If the initial stop has an insufficient basis or if the pat search exceeds the scope of a legitimate search for weapons, then any objects seized as a result of those improper actions would be inadmissible at trial.

Such exclusion is sufficient to deter illegitimate police activity. Imposing a warrant requirement on all seizures where the probable cause is developed, in part, through the sense of touch would do little to deter illegitimate intrusions into the privacy of citizens and would needlessly endanger public safety.

3. Once police have probable cause to believe that a suspect possesses contraband, they may also seize the contraband under the alternate rationale that the seizure was part of a search incident to arrest.

Officer Rose's seizure of the crack cocaine was also permissible under the search incident to arrest exception to the warrant requirement. Pursuant to this exception, police are allowed to seize items from a person who has been lawfully placed under arrest. *See Chimel v. California*, 395 U.S. 752, 755-56 (1969).

The fact that the arrest did not occur until after Officer Rose seized the crack cocaine did not invalidate the seizure. As this Court noted:

> Where the formal arrest followed quickly on the heels of the challenged search of petitioner's

> person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.

Rawlings v. Kentucky, 448 U.S. 98, 111 (1980) (citations omitted).

Several courts that have affirmed seizures under the "plain touch" exception, have also affirmed the same seizures under the alternate rationale that the seizure was part of a search incident to arrest. *See United States v. Ceballos*, 719 F. Supp. 119, 128 (E.D.N.Y. 1989); *Pace*, 709 F. Supp. at 956-57; *Jackson v. State*, 804 S.W.2d 735, 740 (Ark. Ct. App. 1991); *People v. Thurman*, 257 Cal. Rptr. 517, 522 (Cal. Ct. App. 1989); *State v. Bearden*, 449 So. 2d 1109, 1116 (La. Ct. App.), *writ denied*, 452 So. 2d 179 (La. 1984).[17]

Because Officer Rose's touching of the lump gave him sufficient probable cause to believe that Respondent had committed the offense of possession of a controlled substance,[18] he was entitled to make a warrantless arrest of Respondent. *See United States v. Watson*, 423 U.S. 411, 421 (1976). Consequently, it was not unreasonable for Officer Rose to conduct the seizure of the crack cocaine before a formal arrest. The fact that Officer Rose seized the crack cocaine immediately before, rather than

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17. Two courts have affirmed seizures *solely* on the ground that it was properly seized incident to arrest when the probable cause for the arrest was based, in part, upon the officer's feel of the contraband during a protective pat search and the arrest occurred after the seizure. *See State v. Cornell*, __N.W.2d__, No. C7-92-941, slip op. at 11 (Minn. Ct. App. Oct. 27, 1992); *State v. Alamont*, 577 A.2d 665, 668-69 (R.I. 1990).

18. This probable cause is outlined in Argument II of this Brief.

immediately after, the arrest is of no constitutional significance. Under either scenario, the probable cause obtained from Officer Rose's touching of the crack cocaine justified the seizure of the crack cocaine.

II.

OFFICER ROSE'S SEIZURE OF THE CRACK COCAINE WAS PERMISSIBLE UNDER THE "PLAIN FEEL" COROLLARY TO THE PLAIN VIEW DOCTRINE.

Two criteria must be satisfied before a seizure is justified pursuant to the "plain feel" corollary to the plain view doctrine.[19] First, the officer must have have lawfully felt the item. Second, the sense of touch, when combined with other circumstances, must provide the officer with probable cause[20] to believe that the container holds contraband or other evidence of a crime. *See, e.g, United States v. Salazar*, 945 F.2d 47, 51 (2d Cir. 1991), *cert. denied*, ___U.S.___, 112 S. Ct. 1975 (1992); *Ceballos*, 719 F. Supp. at 127-28; *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992); *see also* Holtz, *"Plain Touch,"* at 530-31.

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19. These two criteria for the "plain feel" exception mirror the two requirements for seizures under the "plain view" doctrine. *See Horton v. California*, 496 U.S. 128, 136-37 (1990).

20. Most of the courts adopting the "plain feel" exception have indicated that the officer only needs probable cause to make the seizure. But some courts have required the higher standard of "reasonable certainty." *United States v. Williams*, 822 F.2d 1174, 1184 (D.C. Cir. 1987). *See also State v. Vasquez*, 815 P.2d 659, 664 (N.M. Ct. App.), *cert. denied*, 815 P.2d 1178 (N.M. 1991); *In the Matter of Marrhonda G.*, 575 N.Y.S.2d 425, 431 (N.Y. Fam. Ct. 1991), *aff'd*, 585 N.Y.S.2d 345 (N.Y. App. Div. 1992). This Court, however, has stated that probable cause is all that is necessary to justify a search or seizure. *See Texas v. Brown*, 460 U.S. 730, 741-42 (1983); *see also United States v. Pace*, 709 F. Supp. 948, 955 n.3 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990).

The first criteria requires that police both lawfully be in the place where the touch occurred and lawfully touch the object. The officer may be making an investigative stop, a routine traffic stop or an intrusion pursuant to a warrant or consent. Once the officer has lawful access to that location, he must also have a lawful right to touch or feel the object. This touch often occurs during a weapons pat search of a suspect. *See, e.g., Jackson*, 804 S.W.2d at 737 (pat search following *Terry* stop); *People v. Hughes*, 767 P.2d 1201, 1203 (Colo. 1989) (pat search of person during police execution of premises warrant); *State v. Vanacker*, 759 S.W.2d 391, 392 (Mo. Ct. App. 1988) (pat search following traffic roadblock stop).

The second criteria requires that the officer's sense of touch, combined with other circumstances, must provide the officer with probable cause to believe that the object is contraband or other evidence of a crime. These other circumstances can include the officer's experience and training, the circumstances surrounding the search and the officer's prior knowledge of the suspect's activities. *See, e.g., Ceballos*, 719 F. Supp. at 125 (suspect's evasive behavior along with officer's sense of touch contributed to probable cause); *People v. Lee*, 240 Cal. Rptr. 32, 33-34, 36 (Cal. Ct. App. 1987) (suspect's presence in area known "for 'high narcotic activity'" and officer's sense of touch contributed to probable cause); *Doctor*, 596 So. 2d at 445 (officer's touch of the contraband and his experience of feeling crack cocaine on 800 prior occasions contributed to probable cause).

Both criteria for the "plain feel" doctrine have been satisfied in the instant case. First, all three courts below ruled that Officer Rose lawfully touched Respondent's pocket. These courts found that Officer Rose had both specific and articulable facts to suspect that Respondent may

be involved in criminal activity and a reasonable basis to fear for his safety during the investigative stop.[21] *See Dickerson*, 481 N.W.2d at 843 (Petition Appendix A-5); *State v. Dickerson*, 469 N.W.2d 462, 465 (Minn. Ct. App. 1991), *aff'd*, 481 N.W.2d 840 (Minn. 1992) (Petition Appendix B-6); Trial Court Order (Petition Appendix C-3).

Second, Officer Rose's feel of the pocket, along with other factors, was sufficient to establish probable cause to believe that there was crack cocaine in Respondent's pocket.[22] Officer Rose testified that when he touched the fine nylon jacket pocket, he felt a small lump wrapped in cellophane (T. 9). When he examined the lump with his fingers, it slid (T. 9). From this feel, and his experience in feeling crack cocaine in pockets on 50 to 75 other occasions, he was "absolutely sure" that the lump was crack cocaine (T. 5-6, 9-10). The officer's knowledge that the lump matched the distinctive shape of crack cocaine and his recognition that the lump was in packaging commonly used for crack cocaine, coupled with his knowledge that

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21. Although Officer Rose testified that he pat searched Respondent for "weapons and contraband" (T. 9), his candor that he expected to find contraband on Respondent did not affect the constitutionality of the pat search. As long as there is an objectively determined constitutional basis for the pat-down, the fact that an officer may also have another motive does not invalidate the seizure of contraband or other evidence of a crime found during a search. *See Horton v. California*, 496 U.S. 128, 137-42 (1990). Therefore, the pat search of Respondent was valid since, as all three courts below found, there was a constitutional basis justifying the search.

22. If the higher standard of "reasonable certainty" set forth in *United States v. Williams*, 822 F.2d 1174 (D.C.Cir. 1987), were imposed in this case, Officer Rose's uncontroverted testimony that he was "absolutely sure" that the lump was crack cocaine (T. 10) satisfies this standard.

Respondent had just left a notorious crack house and took evasive action when he saw the police patrol car established probable cause to believe that the lump was crack cocaine.

In numerous cases where the facts surrounding the seizure of contraband are virtually identical to the facts in this case, courts have affirmed "plain feel" seizures. These courts found that the officer's sense of touch, under the totality of the circumstances, established probable cause for the seizure.[23]

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23. *See, e.g., United States v. Salazar*, 945 F.2d 47, 48 (2d Cir. 1991), *cert. denied*, ___U.S.___, 112 S. Ct. 1975 (1992) (officer "squeezed the outside of the pocket and . . . felt the crackling of plastic"); *United States v. Ceballos*, 719 F. Supp. 119, 122 (E.D.N.Y. 1989) (officer "felt a large bulge" inside the suspect's jacket); *United States v. Pace*, 709 F. Supp. 948, 951 (C.D. Cal. 1989), *aff'd*, 893 F.2d 1103 (9th Cir. 1990) (officer felt two hard objects on the defendant's back that he identified through the "clothing as having the size and shape of two kilos of cocaine packaged in the form of 'bricks'"); *People v. Thurman*, 257 Cal. Rptr. 517, 521-22 (Cal. Ct. App. 1989) (believing that object was a gun, officer stuck his hand inside jacket pocket, squeezed the object and realized it was "rock cocaine" in a baggie); *People v. Lee*, 240 Cal. Rptr. 32, 34, 37 (Cal. Ct. App. 1987) (officer patted the chest area of defendant and "felt a clump of small resilient objects" that he believed were heroin-filled balloons); *People v. Hughes*, 767 P.2d 1201, 1203 (Colo. 1989) (officer felt a "hard cylindrical object" and pulled out a film canister containing cocaine); *Doctor v. State*, 596 So. 2d 442, 445 (Fla. 1992) (officer who had felt crack cocaine over 800 times, felt plastic bag with "peanut brittle type feeling in it" which he "equated to the texture of rock cocaine"); *State v. Bearden*, 449 So. 2d 1109, 1116 (La. Ct. App.), *writ denied*, 452 So. 2d 179 (La. 1984) (officers "felt an object [in the suspect's sock], which was obviously not a weapon, but which could be *tactilely* identified as a large quantity of pills" in a bag); *see also State v. Alamont*, 577 A.2d 665, 668 (R.I. 1990) (affirmed seizure pursuant to a probable cause arrest where the officer could detect a vial of crack based upon "its distinctive size and shape").

The trial court, which had an opportunity to observe Officer Rose's demeanor when he testified, found Officer Rose's testimony concerning his probable cause belief to be credible. *See* Trial Court Order (Petition Appendix C-2-3). Respondent offered no evidence to dispute Officer Rose's testimony (T. 28-33). Respondent also never requested that the trial court, itself, feel the crack cocaine through a nylon jacket. "[T]actile information can be preserved for trial to assure courts of an opportunity to evaluate the objects the officer claims to have triggered his sense of touch." *Pace*, 709 F. Supp. at 956. Accordingly, Respondent's failure to request that the trial court feel the crack cocaine weighs against any claim he may have that the officer's testimony was not credible.

Although the majority of the Minnesota Supreme Court questioned the credibility of Officer Rose's conclusion, this Court is not bound by the majority's skepticism. While this Court will not sit as a trial court "to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record." *Ker v. California*, 374 U.S. 23, 34 (1963). Independent review of the record in this case supports the trial court's finding that the totality of the circumstances established probable cause for the seizure. As the dissenting opinion noted, there is "no basis for rejecting the trial court's determination of credibility." *Dickerson*, 481 N.W.2d at 849 (Coyne, J., dissenting) (Petition Appendix A-19).

Officer Rose conducted a lawful stop and pat search of Respondent. His sense of touch during this search, combined with the totality of the other circumstances in this case, established probable cause to believe that Respondent possessed crack cocaine. Therefore, the probable cause

seizure of the crack cocaine was proper under the "plain feel" corollary to the plain view exception to the warrant requirement.

CONCLUSION

For the foregoing reasons, the State of Minnesota respectfully submits that the judgment of the Minnesota Supreme Court should be reversed.

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APPENDIX

APPENDIX A

Minnesota Constitutional and Statutory Provisions

Minn. Const., art. 1, §10:

> **Unreasonable searches and seizures prohibited.** The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be searched and the person or things to be seized.

Minnesota Statute § 152.025, subd. 2(1), subd. 3(a) (1989):

> Subd. 2. **Possession and other crimes.** A person is guilty of controlled substance crime in the fifth degree if:
> (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in schedule I, II, III, or IV, except a small amount of marijuana . . . .
>
> * * *

Subd. 3. **Penalty**. (a) A person convicted under subdivision 1 or 2 may be sentenced to imprisonment for not more than five years or to payment of a fine of not more than $10,000, or both.

Minnesota Statute § 152.18, subd. 1 (1989):

If any person is found guilty of a violation of section 152.024, 152.025 or 152.027 for possession of a controlled substance, after trial or upon a plea of guilty, the court may, without entering a judgment of guilt and with the consent of such person, defer further proceedings and place the person on probation upon such reasonable conditions as it may require and for a period, not to exceed the maximum term of imprisonment provided for such violation. The court may give the person the opportunity to attend and participate in an appropriate program of education regarding the nature and effects of alcohol and drug abuse as a stipulation of probation. Upon violation of a condition of the probation, the court may enter an adjudication of guilt and proceed as otherwise provided. The court may, in its discretion, dismiss the proceedings against such person and discharge the person from probation before the expiration of the maximum period prescribed for such person's probation. If during the period of probation such person does not violate any of the conditions of the probation, then upon expiration of such period the court shall discharge such person and dismiss the proceedings against that

person. Discharge and dismissal hereunder shall be without court adjudication of guilt, but a nonpublic record thereof shall be retained by the department of public safety solely for the purpose of use by the courts in determining the merits of subsequent proceedings against such person. The court shall forward a record of any discharge and dismissal hereunder to the department of public safety who shall make and maintain the nonpublic record thereof as hereinbefore provided. Such discharge or dismissal shall not be deemed a conviction for purposes of disqualifications or disabilities imposed by law upon conviction of a crime or for any other purpose.

Minnesota Statute § 152.18, subd. 2 (1989):

Upon the dismissal of such person and discharge of the proceedings against the person pursuant to subdivision 1, such person may apply to the district court in which the trial was had for an order to expunge from all official records, other than the nonpublic record retained by the department of public safety pursuant to subdivision 1, all recordation relating to arrest, indictment or information, trial and dismissal and discharge pursuant to subdivision 1. If the court determines, after hearing, that such person was discharged and the proceedings dismissed, it shall enter such order. The effect of the order shall be to restore the person, in the contemplation of the law, to the status the person occupied before such arrest or indictment or

information. No person as to whom such an order has been entered shall be held thereafter under any provision of any law to be guilty of perjury or otherwise giving a false statement by reason of the person's failure to recite or acknowledge such arrest, or indictment or information, or trial in response to any inquiry made for the person for any purpose.

APPENDIX B

United States Sentencing Guidelines Provisions

U.S.S.G. §4A1.1:

Criminal History Category

The total points from items (a) through (f) determine the criminal history category in the Sentencing Table in Chapter Five, Page A.

(a) Add 3 points for each prior sentence of imprisonment exceeding one year and one month.

(b) Add 2 points for each prior sentence of imprisonment of at least sixty days not counted in (a).

(c) Add 1 point for each prior sentence not counted in (a) or (b), up to a total of 4 points for this item.

(d) Add 2 points if the defendant committed the instant offense while under any criminal justice sentence, including probation, parole, supervised release, imprisonment, work release, or escape status.

(e) Add 2 points if the defendant committed the instant offense less than two years after release from imprisonment on a sentence counted under (a) or (b) or while in imprisonment or escape status on such a

sentence. If 2 points are added for item (d), add only 1 point for this item.

(f) Add 1 point for each prior sentence resulting from a conviction of a crime of violence that did not receive any points under (a), (b), or (c) above because such sentence was considered related to another sentence resulting from a conviction of a crime of violence, up to a total of 3 points for this item. *Provided*, that this item does not apply where the sentences are considered related because the offenses occurred on the same occasion.

U.S.S.G. §4A1.a(c), Commentary 3:

§4A1.1(c). One point is added for each prior sentence not counted under §4A1.1(a) or (b). A maximum of four points may be counted under this item. The term "prior sentence" is defined at §4A1.2(a).

Certain prior sentences are not counted or are counted only under certain conditions:

A sentence imposed more than ten years prior to the defendant's commencement of the instant offense is not counted. See §4A1.2(e).

An adult or juvenile sentence imposed for an offense committed prior to the defendant's eighteenth birthday is counted only if imposed within five years of the defendant's

commencement of the current offense. See §4A1.2(d).

Sentences for certain specified non-felony offenses are counted only if they meet certain requirements. See §4A1.2(c)(1).

Sentences for certain specified non-felony offenses are never counted. See §4A1.2(c)(2).

A diversionary disposition is counted only where there is a finding or admission of guilt in a judicial proceeding. See §4A1.2(f).

A sentence for a foreign conviction, a tribal court conviction, an expunged conviction, or an invalid conviction, is not counted. See §4A1.2(h),(i),(j), and the Commentary to §4A1.2.

A military sentence is counted only if imposed by a general or special court martial. See §4A1.2(g).

U.S.S.G. §4A1.2(f):

Diversionary Dispositions

Diversion from the judicial process without a finding of guilty (*e.g.*, deferred prosecution) is not counted. A diversionary disposition resulting from a finding or admission of guilt, or a plea of *nolo contendere*, in a judicial proceeding is counted as a sentence under

§4A1.1(c) even if a conviction is not formally entered, except that diversion from juvenile court is not counted.

U.S.S.G. §4A1.2(f), Commentary 9:

Diversionary Dispositions: Section 4A1.2(f) requires counting prior adult diversionary dispositions if they involved a judicial determination of guilt or an admission of guilt in open court. This reflects a policy that defendants who receive the benefit of a rehabilitative sentence and continue to commit crimes should not be treated with further leniency.